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No. 80-1678

In the Supreme Court of the United States

OCTOBER TERM, 1980

NORA FAYE JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the United States may be held liable under the Federal Tort Claims Act for the wrongful death of a military serviceman who committed suicide while on leave, on the theory that government personnel were negligent in releasing the serviceman from the post hospital and granting him leave.

1. Petitioner is the widow of Jimmy Ray Johnson, a sergeant in the United States Army who committed suicide on January 27, 1971. Four months prior to his death, Sgt. Johnson had been diagnosed by an Army psychiatrist as "suffering from a severe psychosis accompanied by homicidal and suicidal tendencies" (Pet. App. 4A). Early in January 1971, Sgt. Johnson was jailed for assaulting petitioner, although he subsequently was released on the condition that he enter the post hospital (*ibid.*). Sgt. Johnson entered the post hospital on January 11, 1971, but he was discharged from the hospital ten days later. On January 25,

1971, he requested leave (*ibid.*). After consulting with the Army psychiatrist who had been treating Sgt. Johnson (Pet. App. 3B-4B), the battalion executive officer granted this request, reversing the decision of Sgt. Johnson's captain who had feared further disturbances should he be granted leave (*ibid.*). Sgt. Johnson then proceeded to the home of petitioner's brother, where he killed his brother-in-law, Carroll Johns, shot petitioner, and then killed himself (Pet. App. 4A-5A).

Three lawsuits were filed against the United States under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, as a result of this incident. Carroll Johns' widow brought suit in the United States District Court for the Southern District of Georgia for the wrongful death of her husband, alleging that the government had been negligent in releasing Sgt. Johnson from the hospital and in granting him leave (Pet. App. 5A). Petitioner filed two suits, one for her own injuries and one for the wrongful death of Sgt. Johnson, in the United States District Court for the Middle District of Florida (*ibid.*). A trial in the suit brought by Mrs. Johns resulted in a judgment adverse to the government. *Johns* v. *United States*, Civ. No. 769 (S.D. Ga. Aug. 6, 1973). The Fifth Circuit subsequently held that this judgment collaterally estopped the government from denying its negligence in the suits brought by petitioner and therefore reversed a judgment in favor of the government based on a finding that government personnel had not been negligent. *Johnson* v. *United States*, 576 F. 2d 606 (1978).

In light of this holding, the government stipulated in both of the suits brought by petitioner that it had been negligent in releasing Sgt. Johnson and that this negligence was the proximate cause of the shootings (Pet. App. 6A). A judgment in favor of petitioner was thereafter entered in the suit to recover for her own injuries (Pet. App. 6A n.2). However, in the suit for the wrongful death of Sgt. Johnson, the case presented here, the district court held that petitioner's claim

was barred by this Court's decision in *Feres* v. *United States*, 340 U.S. 135 (1950). See Pet. App. 1B-22B. The court of appeals affirmed, holding that because "all the government actions that resulted in Sgt. Johnson's death were directly, and substantially, related to his military service * * * there can be no FTCA recovery * * *" (Pet. App. 15A).

2. The decision below is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review is not warranted.

In *Feres* v. *United States, supra*, this Court held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service" (340 U.S. at 146). Petitioner contends (Pet. 17) that the court of appeals erred in concluding that *Feres* governs the resolution of this case because "Sergeant Johnson's *injuries* (and hence plaintiff's claim) arose while on leave * * *" (emphasis in original). This contention is without merit, for the holding in *Feres* is not limited to injuries that actually occur in the course of activity incident to service; that decision also bars governmental liability for injuries that "arise out of" activity incident to service.[1] The court below specifically held that "all the government actions that resulted in Sgt. Johnson's death were directly, and substantially, related to his military service" (Pet. App. 15A). Indeed, petitioner acknowledges (Pet. 15) that the negligent governmental acts upon

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[1] In addition to the court below, the Third and First Circuits have had occasion to rely upon the "arise out of" language in *Feres* in holding that the government is not liable for injuries that occur in a non-service context but are caused by activity that was incident to service. See *Henning* v. *United States*, 446 F. 2d 774, 777 (3d Cir. 1971) ("We think that *Feres* focuses not upon when the injury occurs or when the claim becomes actionable, but rather the time of, and the circumstances surrounding the negligent act."); *Torres* v. *United States*, 621 F. 2d 30 (1st Cir. 1980).

which her claim is based—the release of Sgt. Johnson from the post hospital and the grant of leave—occurred while he was on duty.

Petitioner's reliance upon *Brooks* v. *United States*, 337 U.S. 49 (1949), is misplaced. *Brooks* simply held that the government could be held liable for "an accident which had nothing to do" with a serviceman's military activities and for "injuries not caused by" his service (337 U.S. at 52)—in that case, injuries sustained by an off-duty serviceman in an automobile collision with another vehicle that happened to be an Army truck. In *Brooks*, then, the fact that the person injured was a serviceman was a mere fortuity, having no relation to the government's negligent acts. In the present case, in contrast, the government personnel engaged in the acts in question only because of Sgt. Johnson's military status. This Court has reconciled *Brooks* and *Feres* by observing that a "line [is to be] drawn * * * between injuries that did and injuries that did not arise out of or in the course of military duty." *United States* v. *Brown*, 348 U.S. 110, 113 (1954). Where, as here, "the negligent act giving rise to the injury * * * was * * * incident to the military service" (*ibid.*), *Feres* rather than *Brooks* controls.

Petitioner's argument (Pet. 16-17) that the claim in this case did not accrue for statute of limitations purposes until Sgt. Johnson was on leave is wholly beside the point. The *Feres* doctrine is based upon the relationship out of which a claim arises, see *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 671-672 (1977), and all of the negligent acts charged against the government in this case occurred in the context of Sgt. Johnson's military service. To the extent that petitioner's claim is based upon governmental negligence in releasing Sgt. Johnson from the post hospital (Pet. App. 9A), it is barred by the consistent line of authority holding that the medical care given servicemen in military hospitals is entwined with the military relationship. See,

e.g., Veillette v. *United States*, 615 F. 2d 505 (9th Cir. 1980); *Harten* v. *Coons*, 502 F. 2d 1363 (10th Cir. 1974); *Henning* v. *United States*, 446 F. 2d 774 (3d Cir. 1971); *Shults* v. *United States*, 421 F. 2d 170 (5th Cir. 1969).[2] To the extent that petitioner's claim is based upon governmental negligence in granting Sgt. Johnson leave (Pet. App. 10A), it is barred by the need, consistently recognized by this Court, to prevent "second-guessing military orders" (*Stencel Aero Engineering Corp.* v. *United States, supra*, 431 U.S. at 673) in Tort Claims litigation.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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[2]In *Feres*, this Court resolved in the government's favor three cases involving injuries to servicemen, one of which (*Jefferson* v. *United States*, No. 29, 1950 Term) involved a claim for medical malpractice that appears not to have accrued for statute of limitations purposes until after the serviceman's discharge from the Army. 340 U.S. at 137.